



**BACKGROUND**

On September 9, 2009, Defendant, Jose Hernandez-Contreras ("Mr. Hernandez"), pled guilty to a one count Information charging him with Deported Alien Found in the United States, in violation of 8 U.S.C. § 1326(a) and (b).

On June 26, 2009, a border patrol agent observed an individual, later identified as Mr. Hernandez, climbing over the primary boundary fence one mile west of the San Ysidro Port of Entry. Mr. Hernandez ran a few yards and used limbs from a nearby tree to scale the secondary fence. He then attempted to conceal himself in the tree. When confronted, Mr. Hernandez admitted to the border patrol agent that he was in the United States illegally. Mr. Hernandez was taken to a station for processing. A records check revealed he had both a criminal and immigration history.

**OBJECTIONS to PSR**

First, Mr. Hernandez objects to the listed AKAs, dates of birth and "other identification numbers" listed on page i, line 13 through page ii, line 43. Probation states this information was gathered from Mr. Hernandez' various rap sheets and prior arrest records. Probation correctly asserts this information should stay in the PSR.

Next, Mr. Hernandez objects to the entire section of "Other Law Enforcement Contacts" on page 9 line 26 through page 10, line 13. He claims the information is hearsay and he has not seen the underlying reports. Probation states that the information was obtained by a fingerprint match with arrest records, except where otherwise noted. Probation also correctly states that under § 1B1.3, the Court may consider all acts of the defendant for sentencing purposes.

Next, Mr. Hernandez objects to the separate scoring for the three convictions listed on page 8 line 19 through page 9, line 11. Mr. Hernandez asserts they should be scored only as one offense because they were consolidate for the purpose of sentencing.

However, Section 4A1.2(a)(2) states that

Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested

1 for the first prior to committing the second offense). U.S.S.G § 4A1.2(a)(2)  
2 Probation correctly states that each of the three convictions were separate crimes, with  
3 separate case numbers, different arrest dates, and different plea dates. For example, Mr.  
4 Hernandez was arrested on September 13, 2006 in case # VCF170420. He was  
5 subsequently arrested in case # VCF182412 on November 17, 2006. Hence, he was  
6 arrested for the first offense prior to committing the second offense. Therefore, under #  
7 4A1.2(a)(2) there was an intervening arrest and these crimes should be counted  
8 separately. Likewise, he was arrested for the third crime on February 19, 2007, which  
9 was also after the previous two convictions. Therefore, this conviction should also be  
10 counted separately.

11 Finally, Mr. Hernandez objects that Probation gave him a +8 for an aggravated  
12 felony for his prior conviction for first degree burglary under § 2L1.2(b)(1)(C). Under  
13 this section, the definition of aggravated felony is the same as under 8 U.S.C. §  
14 1101(a)(43). Under § 1101(a)(43)(G), an aggravated felony is “a theft offense . . . or  
15 burglary offense for which the term of imprisonment” is at least one year. Mr,  
16 Hernandez was convicted of burglary in 1979 and did 2 years in prison after his parole  
17 was revoked. Hence the 8 level increase is appropriate. Although this conviction is  
18 more than 30 years old, Mr. Hernandez has an extensive and continuing criminal  
19 background. In fact, Probation states that a 16 level enhancement for drug trafficking  
20 would be more appropriate except there are no supporting documents.

21 Mr. Hernandez also makes several constitutional type arguments which have  
22 previously been rejected by the Ninth Circuit. First, Mr. Hernandez argues that since the  
23 Information did not specifically enumerate his prior offenses, that now his sentence can  
24 not be enhanced by those prior offenses. Mr. Hernandez argues that his sentence is  
25 limited to the statutory maximum of 24 months under § 1326(a). However, Mr.  
26 Hernandez pled guilty, pursuant to a written plea agreement, to violation of 8 U.S.C. §  
27 1326(a) and (b) and all the requisite elements. This includes the element of being  
28 deported after commission of a felony. Hence, this argument fails. Also, the Ninth

1 Circuit in US v. Covian-Sandoval, 462 F.3d 1090, 1096 (9<sup>th</sup> Cir. 2006) specifically  
2 found that under Almendarez-Torres, a judge may enhance a defendant's sentence for a  
3 prior conviction even though it was not charged in the indictment, submitted to a jury or  
4 proved beyond a reasonable doubt.

5 Second, Mr. Hernandez argues that there is insufficient proof to support the 8 level  
6 increase. Mr. Hernandez argues that it is the government's burden to prove any  
7 sentencing enhancement. Since, the government only agreed to a 4 level increase, the  
8 government did not prove the 8 level enhancement. Mr. Hernandez misstates how  
9 sentencing works. The court may take into consideration any and all relevant facts in  
10 sentencing a defendant, including all his prior convictions. The court is not limited to  
11 just what the government presents. In this case, Probation has presented Mr.  
12 Hernandez' extensive criminal history. And again, under Covian-Sandoval, prior  
13 convictions need not be included in the charging document, presented to a jury or  
14 proved beyond reasonable doubt. Accordingly,

15 **IT IS ORDERED** that Mr. Hernandez' Objections to the PSR are **DENIED**.

16 **IT IS SO ORDERED.**

17  
18 *April 19, 2010*  
19 date

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GORDON THOMPSON, JR.  
United States District Judge

21 cc: All counsel and parties without counsel  
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